IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
CENTRAL EXCISE APPEAL NO. 33 OF 2006

M/s.Nagreeka Foils Ltd. .. Appellant
v/s.
Commissioner of Central Excise & Customs,
Vapi. .. Respondent

Mr.Vipin Kumar Jain with Mr.P.K.Shetty for the appellant.

Mr.P.S.Jetley i/by Dr.T.C.Kaushik for the respondent.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 31ST MARCH, 2006.

P.C.

Heard Mr.Vipin Kumar Jain, the learned counsel for the appellant and Mr.P.S.Jetley, the learned counsel for the revenue.

2. The following substantial question of law arises in this appeal:-

> Whether the Tribunal was correct in dismissing the appeal without assigning any reason, merely by stating that since the Commissioner (Appeals) has already granted substantial relief, further reduction or setting aside of the penalty is not called for?

3. Admit.

4. Mr.P.S.Jetley, advocate wavies service for the revenue.

5. The appeal is heard finally at this stage.

6. In challenging the order passed by the Commissioner (Appeals), the present appellant set up the following grounds in the memo of appeal before the Tribunal:-

> "9.1 Commissioner (Appeals) has erred in confiscating the goods under Rule 173Q(1) of the Central Excise Rules, 1944, without specifying that as to which sub-clause of Rule 173Q(1) was being sought to be invoked against the appellant. Appellant submits that it is well settled law that provisions of Rule 173Q(1) cannot be invoked until and unless it is clearly specified as to which sub-clause of sub-rule (1) is being sought to be invoked. Appellant submits that to its mind only clause (b) or clause (d) of Rule 173Q could be alleged to have been contravened. Clause (b) of Rule 173Q provides for confiscation of goods in case the manufacturer does not account for excisable goods manufactured or produced by him. Appellant submits that it had clearly pointed out that clause (b) of Rule 173Q could not be invoked inasmuch as the term "account for" not synonymous to entry in RG 1 Register. Commissioner (Appeals) has failed to appreciate that it is not in dispute that the finished goods which were seized were undisputedly manufactured out of duty paid and accounted for inputs. Appellant submits that the Commissioner (Appeals) has overlooked the decision of the Hon'ble Tribunal in the case of CCE vz.Continental Chemicals and Pepsi Food vs. CCE, which was specifically cited before him, wherein the Hon'ble Tribunal held that the expression "account for" is not synonymous with entering into RG 1 Register and that provisions of Rule 173Q (1)(b), could not be invoked in a case where goods were not entered in RG 1 register but were otherwise accounted for out of duty paid raw

materials. The Commissioner (Appeals) has also overlooked the appellant's contention that provisions of Rule 173Q (1)(b) & 173Q (1)(d) of Central Excise Rules, 1944 could not be invoked until and unless it was established there was an intention to evade payment of duty on the part of the appellant. Appellant submits that there could not be any intention to evade payment of duty on its part inasmuch as the goods which have not been entered in the RG 1 register had been manufactured as per specification of the buyers whose names were mentioned on the packing slip which was seized along with the finished goods. This packing slip mentioned in name of the buyer, weight of the material, batch No. of the foil, size of the foil, etc., which tallied with the purchase orders placed by the clients. The purchase order also clearly mentioned excise would be reimbursed to the appellant on actuals. Appellant submits that none of the aforesaid contentions of the appellant have been dealt with or considered by the Commissioner (Appeals), which clearly establish that there was no intention to evade duty on the part of the appellant.

9.2 Commissioner (Appeals) has also overlooked the decision of the Hon'ble Tribunal in the case of Bhilai Conductors vs. CCE wherein the Hon'ble Tribunal has held that provisions of Rule 173Q(1)(b) could not be invoked until and unless there was an intention to evade payment of duty. Appellant submits that the impugned order does not deal with the appellant's arguments regarding non-applicability of Rule 173Q and the order deserves to be quashed and set aside on this ground alone.

9.3 Commissioner (Appeals) has erred in placing reliance on the decisions of the Tribunal in the case of CCE Vs. Balu Ram harnam Dass Steel Rolling Mills – 2004(170) ELT 111 (Tri.Del) to hold that the finished goods which had not been entered into in the RG1 register were liable to confiscation, appellant respectfully submits that the Commissioner (Appeals) has erred in relying upon the aforesaid decision, inasmuch as the said decision does not take into account other binding precedent to the Division Bench's decision of the Tribunal. Commissioner (Appeals) has erred in preferring the decision of single member bench of the Tribunal over several

Division Bench decisions which were cited before the Commissioner (Appeals), all of which in unequivocal terms provide that penalty and the fine under rule 173Q(1)(b) cannot be imposed until and unless there is mens rea on the part of such manufacturer and that the expression “account for” appearing in clause (b) of sub-rule 1 of Rule 173Q meant, to explain `presence of' and was not synonymous entry in the RG 1 register. Appellant submits that Commissioner (Appeals) has for reasons best known to him preferred to rely upon and take cognizance of the decision of single member, which neither takes into account the other binding decisions of the Division Bench nor does it discuss the applicability or otherwise of Rule 173Q, appellant therefore submits that the impugned order, which has been passed by placing reliance on a decision, which is not only per incuraim but also sub silentio of other binding precedent cannot be sustained deserves to be quashed and set aside on this ground alone.

9.4 Without prejudice to the above, Commissioner (Appeals) has erred in overlooking appellant's contention that non-accountal of finished goods in its RG 1 Register was on account of the fact that the excise clerk had proceeded on a sudden leave due to a medical emergency in his family, and that its General Manager Shri Panwar was also out of town during the said period. Appellant submits that none of the aforesaid contentions raised by the appellant have been considered by the Commissioner (Appeals), who has also overlooked appellant's contention that there could be no intention to evade duty on its part, inasmuch as finished goods which were not accounted for in the RG 1 Register were manufacture for three of its clients, viz, Finolex Cables Ltd., Sterilite Industries (I) Ltd. and RPG Cables (I) Ltd., all of whom could avail credit of duty paid in respect duty paid on such finished goods. Commissioner (Appeals) also overlooked the appellant's contention that packing lists which were seized along with the finished goods clearly bore the name of the aforesaid three companies as well as other details such as Foil No., Batch No., sizer and weight of the coils, etc., and that there was no attempt to clear the said goods clandestinely. Commissioner (Appeals) has also overlooked the appellant's contention that finished goods were manufactured as per the specifications placed by the buyers and that such finished goods were custom made for each of its buyers who had placed upon the appellant purchase orders for the said goods, which

contained the condition regarding reimbursement of excise duty on actuals. Appellant submits that even though it produced evidence in the form of purchase orders/contract as well as the packing list which were seized during the course of investigation, which clearly establish that the finished goods which were seized were meant for aforesaid buyers and the there could be no intention for evading payment of duty in respect of the said goods, Commissioner (Appeals) has without considering the said submissions held the goods liable to confiscation on the grounds that failure to make entry in the RG1 Register could give rise to commission of frauds leading to evasion of payment of duty, without appreciating that in the facts and circumstances, the instant case there was no scope of any fraud or for that matter any intention to evade payment of duty. Also the mere fact that entry was not made in the RG1 register, cannot ipso facto, lead to conclusion that there was a possibility of commission of fraud and evasion of payment of duty as the finished goods were manufactured from the duty paid and account for raw material and therefore there could be no question of any evasion of payment of duty in the appellant case.

9.5 Commissioner (Appeals) has erred in imposing penalty under Rule 173Q on the ground that even though the impugned order-in-original sought to penalize the appellant under section 11AC read with Rule 173Q and consequently even though section 11AC was not applicable, penalty nonetheless could be imposed under Rule 173Q. Appellant respectfully submits that Commissioner (Appeals) has failed to appreciate that it is well settled law that a composite penalty under section 11AC read with Rule 173Q is not sustainable and that once the Commissioner (Appeals) has concluded that penalty under section 11AC was not imposable, he ought to have set aside the penalty in toto instead of concluding that he could in the alternative impose penalty under rule 173Q, even though the adjudicating authority had penalized the appellant primarily under section 11AC.

9.6 Without prejudice to the above, Commissioner (Appeals) has erred in imposing penalty under Rule 173Q without specifying as to which of the sub-clauses of sub rule 1 of rule 173Q were infringed by the appellant. Appellant submits that it is well settled law that penalty under Rule 173Q(1) cannot be imposed without specifying as to which specific clause of the said sub-rule was infringed by the

assessee. Appellant submits that the impugned order being silent on the said issue, it cannot be sustained and deserves to be quashed and set aside on this ground alone.

9.7 Commissioner (Appeals) has erred in holding that there was shortage of inputs to the extend of 955.70 kegs inasmuch as appellant had not produced any evidence in support of its contention that it had issued the third roll for production but had entered only two rolls in the log sheet as the log sheet was in the custody of the excise officer. Appellant respectfully submits that the Commissioner (Appeals) has come to conclusion regarding shortage on a hypothetical assumption without there being any evidence of any actual shortage. Appellant respectfully submits that Commissioner (Appeals) has upheld the allegation of shortage for a part quantity on the ground that the same was not supported by sufficient documentary evidence. Appellant submits that there is no dispute about the correctness of the reconciliation statement prepared by the appellant, which statement has been in fact admitted by the Commissioner (appeals) as proper and correct, merely because for one particular entry, there is no documentary evidence, the same cannot per se lead to a conclusion that there was shortage particularly when the burden of establishing shortage and clandestine removal is on the department and that it did not produce any evidence in support of its allegation of shortage.

9.8. Appellant submits that allegation of shortage is a serious allegation, which the department has to establish on credible and cogent evidence and not merely because there was lack of documentary evidence for one particular entry, it cannot lead to a conclusion that there was shortage, in respect of which credit was deniable.

9.9 Without prejudice to the above, Commissioner (Appeals) has also failed to appreciate that the order for reversal of credit and penalty, under rule 571 as well as for imposition of fine under Rule 173Q of the erstwhile central excise rules is not sustainable inasmuch as the said rules have been substituted by cenvat provisions in terms of Notification 27/2000 CE NT dated 31.3.2000 and that under the new rules, there is saving clause for acts, omissions committed under the erstwhile rules. Appellant submits that in the absence of there being any saving

> clause, there cannot be any demand of modvat credit or imposition of penalty under the erstwhile rules 571 which was the only provision prevailing at the relevant time for denying credit and imposing penalty. Appellant in this regard place reliance on the decisions of the Tribunal in the case of Sunrise Structurals and Engineering Ltd. Vs. CCE, Nagpur, wherein the Tribunal has in order No.A/711 to 722/WZB/04-III dated 27.8.04 upheld the aforesaid contention of assesee."

7. The appellant had also made an application for stay of the order of the Commissioner (Appeals). While dealing with the stay application, the Tribunal disposed of the appeal at the stage of stay application by the following order:-

> "3. I do not see any justification for further reduction or setting aside of the aforesaid penalty amount when the Commissioner (Appeals) has already granted substantial relief to the appellant. I, therefore, dismiss the stay petition as well as the appeal at the stay stage itself."

8. The Tribunal is a final fact finding body on the question of facts and the appeal lies to the High Court under section 35G of the Central Excise Act, 1944 on the substantial question of law only. In the circumstances, the Tribunal has to go into all the issues of the facts and the contentions raised before it and come to a definite finding with the reasons therefor while disposing of the appeal. The disposal of the appeal in the manner it has been done, does not meet this test in disposal of appeal by the Tribunal.

9. We, accordingly, answer the question that the Tribunal was not correct in dismissing the appeal (without assigning any

reason) merely by stating that since the Commissioner (Appeals) has already granted substantial relief, further reduction or setting aside of the penalty is not called for.

10. The appeal is allowed. The impugned order is set aside. Appeal No.E/484/05 is restored to the file of the Customs, Excise & Service Tax Appellate Tribunal for hearing and disposal in accordance with law. No costs.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)